UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JUAN ALONSON, ABELARDO ARIAS, JAIME LOPEZ, RON MENIN, LUIS NARANJO, HECTOR OLVERA, PEDRO ORTIZ, LEONARDO PRIETO, ARKADY SHYTENBERG, VICTOR SOLIS, ALEJANDRO TORRES, LUIS XURUC, and IVAN ZAPATA, on behalf of themselves and all others similarly situated,

Plaintiffs,

-against-

UNCLE JACK'S STEAKHOUSE, INC.; UNCLE JACK'S OF BAYSIDE, INC.; UNCLE JACK'S STEAKHOUSE FRANCHISE, INC.; UNCLE JACK'S STEAKHOUSE MIDTOWN, INC.; WILLIAM J. DEGEL; THOMAS CARPENTER; and, DENNIS BORYSOWSKI,

Defendants.

CIVIL ACTION NO. : 08-7813 (DAB)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DECERTIFY

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PRELIMINARY STATEMENT

Defendants, Uncle Jack's Steakhouse, Inc; Uncle Jack's Steakhouse Franchise, Inc; Uncle Jack's of Bayside, Inc.; Uncle Jack's Steakhouse Midtown, Inc.; William J. Degel; and Thomas Carpenter ("Defendants") by and through their attorneys and pursuant to the FLSA § 216, submit this Memorandum of Law in support of their motion to decertify the class, dismissing without prejudice those claims asserted by opt-in Plaintiffs ("Opt-ins") and moving forward solely on those claims asserted by the individual Plaintiffs ("Plaintiffs").

PROCEDURAL HISTORY

Plaintiffs Juan Alonso, Abelardo Arias, Jaime Lopez, Ron Menin, Luis Naranjo, Hector Olvera, Pedro Ortiz, Leonardo Prieto, Arkady Shteynberg, Victor Solis, Alejandro Torres, Luis Xuruc and Ivan Zapata ("Individual Plaintiffs") brought the current action by filing their original Complaint on September 5, 2008, proximately filing their Amended Complaint on September 26, 2008 (attached hereto as "Exhibit X"), which was served on Defendants on or about September 30, 2008. Plaintiffs' Claims include Fair Labor Standards Act ("FLSA") claims for overtime pay, New York Labor Law ("NYLL") claims for overtime pay, spread of hours pay, retention of gratuities, and failure to pay for uniform purchases and cleaning fees; and claims for retaliation under the FLSA and NYLL. Defendants moved to dismiss the claims. The motion to dismiss was denied and Defendants answered on or about June 19, 2009. Discovery concluded on October 15, 2010. Defendants now move to decertify the collective action class.

STATEMENT OF FACTS

Uncle Jack's Steakhouse is a small business, majority owned and operated by William Degel. Thomas Carpenter is employed by Uncle Jack's Steakhouse to "hire and fire management staff; maintain quality standards; keep the restaurants repaired and help with promotions and marketing." Deposition of Thomas Carpenter ("T.C."), attached as Exhibit A, p. 8. Shortly after starting Uncle Jack's Steakhouse in Bayside, Queens, they opened a separate location and company on 34th Street in Manhattan ("34th St."). In or around December of 2007, Uncle Jack's Steakhouse opened a new location in midtown Manhattan ("Midtown"). T.C., p. 15. These stores carry the Uncle Jack's Steakhouse name but employ separate employee groups, have their own workers compensation policies, have different management and deal with a plethora of varying circumstances associated with doing business in New York City. Deposition of Uncle Jack's Steakhouse Midtown Incorporated ("U.J. Mid."), attached as Exhibit B, pp. 7-8; Ex. C, Worker's Compensation Agreements.

At all three locations, Uncle Jack's Steakhouse utilizes a system whereby employees recorded their clock-in and clock-out times. U.J. Mid., pp. 12-13. At the Midtown location some of these records were lost due to a flood that destroyed a portion of the computer system. U.J. Mid., pp. 13-14. At no point did Plaintiff inspect or have a computer expert of their own inspect the ruined equipment, however it was made known to them that they could if they so chose. Aff. of R. Valli, ¶ 2. Defendants made numerous efforts to try to get the data from these machines and ultimately recovered a large amount of the original data. Aff. of R. Valli, ¶ 3.

As part of running the business, Uncle Jack's Steakhouse employs or employed waiters, captains, bussers, runners and bartenders in order to meet the needs of the many patrons who frequent Uncle Jack's Steakhouse. T.C., pp. 22-23. These individuals are considered "tipped employees" and receive a reduced hourly wage as they receive tips on top of this in order to make up the difference between the minimum wage and the reduced rate. Uncle Jack's had a policy that stated that managers were not to schedule overtime for tipped employees. T.C., p. 85; Aff. of Paul Leventhall ("P.L. Aff."), attached as Exhibit D, ¶ 3; Aff. of Jorge Prieto ("J.P. Aff."), attached as Exhibit E, ¶ 3; Aff. of Jeffrey Kleinman ("J.K. Aff."), attached as Exhibit F, ¶ 3; Aff. of Rufino De La Cruz ("R.C. Aff."), attached as Exhibit G, ¶ 3; Aff. of Angel Sinchi ("A.S. Aff."), attached as Exhibit H, ¶ 3; Aff. of Tom O'Connor ("T.O. Aff."), attached as Exhibit I; ¶ 3; Aff. of Julio Ganzhi ("J.G. Aff."), attached as Exhibit J, ¶ 3; Aff. of David Gadlin ("D.G. Aff."), attached as Exhibit K, ¶ 3; Aff. of Marco Tucuri ("M.T. Aff."), attached as Exhibit L; ¶ 3; Aff of Robert Higgins ("R.H. Aff."), attached as Exhibit M, ¶ 3; Aff. of Robert Bastedo ("R.B. Aff."), attached as Exhibit N; ¶ 3; Aff. of Kevin Sullivan ("K.S. Aff."), attached as Exhibit O, ¶ 3; Aff. of Geovenny Vgalle ("G.V. Aff."), attached as Exhibit P, ¶ 3. Plaintiffs earned much more than the minimum wage in just tips while working for Uncle Jack's Steakhouse. Deposition of Jeffrey Greenberg ("J.G."), attached as Exhibit Q, pp. 70 (Mr. Greenberg made between fifteen and twenty dollars per hour in tips); Deposition of Robert Marrano ("R.M."), attached as Exhibit R, p. 23 (Mr. Marrano worked thirty five hours per week and made between four hundred and a thousand dollars a week); Deposition of Victor Rivera ("V.R."), attached as Exhibit S, pp. 39-40 (Mr. Rivera made "substantially more" than the minimum wage with his tips); P.L. Aff., ¶ 2; J.P. Aff., ¶ 2; J.K. Aff., ¶ 2; R.C. Aff., ¶ 2; A.S. Aff., ¶ 2; T.O. Aff., ¶ 2; J.G. Aff., ¶ 2; D.G. Aff., ¶ 3; M.T. Aff., ¶ 2; R.H. Aff., ¶ 2; R.B. Aff., ¶ 2; K.S. Aff., ¶ 2; G.V. Aff., ¶ 2. This did not include cash tips which were taken home nightly and Plaintiffs and Opt-ins did not provide any evidence or recording of how much in cash wages they brought home. Aff. of R.Valli, ¶ 4; J.G., p. 39-40 (Mr. Greenberg threw away his record of how much he made in cash tips); Deposition of Abelardo Arias ("A.A."), attached as Exhibit T, p. 66 (Mr. Arias asserted Fifth Amendment privileges when asked whether his tax returns indicated cash tips which they took home.).

Plaintiffs and Opt-ins claim that they worked more than forty hours in a week on a regular basis, however the evidence and their testimony shows that if they ever worked more than forty hours, this was an abnormality. R.M., p. 23 (worked thirty five hours per week); J.G., p. 53-54 (was scheduled to work a forty hour work week, as was Uncle Jack's policy); P.L. Aff., ¶ 3; J.P. Aff., ¶ 3; J.K. Aff., ¶ 3; R.C. Aff., ¶ 3; A.S. Aff., ¶ 3; T.O. Aff., ¶ 3; J.G. Aff., ¶ 3; D.G. Aff., ¶ 4; M.T. Aff., ¶ 3; R.H. Aff., ¶ 3; R.B. Aff., ¶ 3; K.S. Aff., ¶ 3; G.V. Aff., ¶ 3.

Often, Plaintiffs and Opt-ins clocked in early, clocked out late, or forgot to clock-out at all, resulting in the timekeeping program containing errors that had to be corrected by management. T.C., pp. 134-38; Deposition of William Corcoran ("W.C."), attached as Exhibit U, pp. 78-91 (Mr. Corcoran admitted that the records were not accurate due to his own failure to clock in and out at the proper times); R.M., pp. 24-37 (Mr. Morrano clocked in early for almost every shift, regardless of when he was scheduled to work); Deposition of Michael Overton ("M.O."), attached as Exhibit V, pp. 119-133 (Mr. Overton's time sheets were disputably inaccurate); A.A., pp. 67-71 (Mr. Arias often did not clock out between shifts if working a double); P.L. Aff., ¶ 4; J.P. Aff., ¶ 4; J.K. Aff., ¶ 4; R.C. Aff., ¶ 4; A.S. Aff., ¶ 4; T.O. Aff., ¶ 4; J.G. Aff., ¶ 4; D.G. Aff., ¶ 5; M.T. Aff., ¶ 4; R.H. Aff., ¶ 4; R.B. Aff., ¶ 4; K.S. Aff., ¶ 4; G.V. Aff., ¶ 4. Throughout the clock-in/clock-out records there are many examples on a daily basis of individuals who either clocked in at a different time from when they were scheduled, clocked out long after the restaurant was closed, or just did not clock out at all. Ex. W, Clock-in/Clock-out reports. These reports were sent directly to the payroll company from the store management, not passing through Mr. Degel's or Mr. Carpenter's offices. T.C., p. 29. If these were edited, it was not known to anybody except the managers at the store level. T.C., pp. 33, 83-84.

Uncle Jack's Steakhouse had a policy of pre-booking parties and charging a service charge that included gratuity. U.J. Mid., p. 21. Of the twenty-five percent service charge, five percentage points went to the store managers who manage the whole event including various extras such as decorations, sound and video. T.C., p. 70. When a party planner was employed, she also received five percentage points. T.C., p. 69. Plaintiffs and Opt-ins assert that because they did not receive the full twenty-five percent that they are entitled to that money and the difference between the reduced minimum wage and the regular minimum wage. The parties occurred on particular days and were scheduled ahead of time in order to assure proper staffing and food preparation. T.C., pp. 67-68.

Three named Plaintiffs claim that they were never paid the minimum wage as well, however no other Plaintiffs or Opt-ins assert these claims as they are entirely atypical of the class. Amended Complaint, ¶ 77. This occurred because of what appeared, but was never actually shown, to be a payroll processing error occurring on the store level. T.C., pp. 43-48.

ARGUMENT

I. Decertification Standard

In a case under which claims are asserted under the FLSA § 216(b) and the process of Court Authorized Notice is utilized, there is a two phase analysis used to determine whether the claims should proceed through trial as a collective action. The first stage involves a very low standard, not even considering the merits of the underlying claims. The second stage, often initiated by a motion for decertification, allows for the Defendants to request that the Court consider the evidence obtained in discovery and make a more involved decision of whether the class of individuals is indeed similarly situated. Proctor v. Allsups Convenience Stores, Inc., 250 F.R.D. 278, 280 (N.D. Tex. 2008) (citing Mooney v. Aramco Services, Inc., 54 F.3d 1207, 1213 (5th Cir. 1995)). At the second stage the burden is on the plaintiffs "to prove that the individual class members are similarly situated." Id. (citing Bayles v. Am. Med. Response of Col., Inc., 950 F. Supp. 1053, 1062-63 (D. Colo. 1996); Ellis v. Elgin Riverboat Resort, 217 F.R.D. 415, 419 (N.D. Ill. 2003); Basco v. Wal-Mart Stores, Inc., 2004 U.S. Dist. LEXIS 12441, *14 (E.D. La. 2004)). Here "there must be a demonstrated similarity among the individual situations . . . . some identifiable factual nexus which binds the named plaintiffs and the potential class members together as victims of a particular alleged discrimination." Heagney v. European American Bank, 122 F.R.D. 125, 127 (E.D.N.Y. 1988) (quoting Palmer v. Readers Digest Ass'n, 42 Fair Empl. Prac. Cas. (BNA) 212, 213 (S.D.N.Y. 1986)). There are several reasons that the current action could be decertified, including but not limited to "(1) the disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available to the defendant which appear to be individual to each plaintiff; and (3) fairness and procedural considerations." Proctor, 250 F.R.D. at 280 (brackets omitted) (quoting Basco, 2004 U.S. Dist. LEXIS 12441 at *10); see also Johnson v. Big Lots Stores, Inc., 561 F. Supp. 2d 567 (E.D. La. 2008). "The more dissimilar plaintiffs' job experiences are from one another and the more individuated an employers' defenses are, the less appropriate the matter is for collective treatment." Johnson, 561 F. Supp. 2d at 573.

In the case at bar , the class should be decertified because (1) there are factual differences in each individual claim, (2) the class is not similarly situated, (3) there are individual defenses to each claim and (4) class trial would require that the case be tried based on individualized evidence rather than class-wide considerations, making it procedurally improper and inherently unfair. Further, it is the Plaintiffs' burden to establish that they will be able to prove their allegations using representative proof rather than individualized evidence.

II. Each individual claim contains factual differences from the class claims

Plaintiffs' claims under the FLSA include those for overtime and minimum wage based on a theory that the Defendants illegally withheld a portion of their tips. For each of these claims, individual questions pre-dominate class issues, requiring decertification.

1. Each individual claim for overtime would need to be proven or disproven on an individual basis

In this case, the problem arises that for each Plaintiff and Opt-in, individual evidence of the hours that they worked would necessarily be admitted and then questioning about each daily circumstance would be required to find whether the Opt-in or Plaintiff is claiming that they worked the hours represented by their clock-in/clock-out time. Because of this, class treatment makes decertification necessary. "Putative class members must share more than a common allegation that they were denied overtime or paid below the minimum wage. The class members must put forth a common legal theory upon which each member is entitled to relief." Sheffield v. Orius Corp., 211 F.R.D. 411, 413 (D. Or. 2002) (citing Daggett v. Blind Enters., 1996 U.S. Dist. LEXIS 22465, *18 (D. Or. 1996)). Class-wide recovery cannot be ascertained through the FLSA when there is a local or individualized method that will necessarily be used to determine the time keeping for each employee. Gatewood v. Koch Foods of Miss., LLC, 2009 U.S. Dist. LEXIS

113896, *56 (S.D. Miss. 2009) (citing Lusardi v. Xerox Corp., 122 F.R.D. 463, 465 (D.N.J. 1988)).

Here, there is no widespread policy of requiring employees to work overtime, or even approval of employees working overtime. Rather, Plaintiffs and Opt-ins claims, as stated during depositions, include that occasionally they worked more than forty hours because a shift ran over, they clocked in early, they did not take a required break or they picked up an extra shift. Defendants assert, through competent evidence as can be seen in the transcripts from the representative depositions, that each circumstance may very well have been the failure of the Plaintiffs and Opt-ins to properly clock-in and clock-out. As such, each hour claimed will necessarily be proven on individual circumstances, recollections and practices. Further, as can be seen in the attached affidavits, these claims are not typical of every class member and proving the claims by representative proof will not be possible as individual evidence will have to be admitted. Because of this, a class based trial would require individual testimony at the very least as to their regular schedule, belief of the number of hours they worked, and to address the numerous errors in clocking in and out. Thus, individual proof being necessary and representative proof being impossible, the class should not be able to proceed as a collective action.

2. Each individual claim for minimum wage is factually different from the other class members

Plaintiffs and Opt-ins' claims for minimum wage vary for many of the same reasons that their overtime claims vary from individual to individual. Plaintiffs and Opt-ins claim that Defendants improperly allowed managers to share in the twenty-five percent service charge that parties paid within Uncle Jack's Steakhouse. Under the FLSA, if their claims were proven,[1] this would permit the Plaintiffs and Opt-ins to recover the difference between the reduced hourly rate and the normal hourly minimum wage. Ayres v. 127 Restaurant Corp., 12 F. Supp. 2d 305, 309 (S.D.N.Y. 1998) (citing 29 U.S.C. 203(m)).[2] However, Plaintiffs and Opt-ins acknowledge that these parties did not occur every day, in reality comprising only a small amount of Defendants' business. Ex. Y, sample of Contract Party Contracts. As such, Plaintiffs and Opt-ins would only be entitled to the difference for the time periods that the contract parties occurred as the rest of the time they do not claim that management shared in any tips. Thus each individual Plaintiff and Opt-in would need to submit proof that they worked on those specific days and were part of that specific tip pool from that day. This type of individual proof makes the Collective process more burdensome than efficient and would require that each claim be individually proven rather than showing a class-wide effect.

III. The class members are not similarly situated to each other

For the purposes of proceeding to trial, the Plaintiffs and Opt-ins in this matter are not similarly situated as there were numerous, significant differences in the employment of each individual Plaintiff and Opt-in relating to what position they were employed in, what schedule they had, what manager they worked under and what store they were employed in. "Neither the FLSA nor its implementing regulations define the term 'similarly situated.'" Hoffmann v. Sbarro, Inc., 982 F. Supp. 249, 261 (S.D.N.Y. 1997). Courts consider "(1) the disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available to the defendant which appear to be individual to each plaintiff; and (3) fairness and procedural considerations." Proctor, 250 F.R.D. at 280 (brackets omitted) (quoting Basco, 2004 U.S. Dist. LEXIS 12441 at *10).

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[1] Defendants assert and can prove that this policy was effectuated in order to compensate management for the additional duties they were required to perform in relation to these contract parties and further that the service charge was not a gratuity as Plaintiffs and Opt-ins would be required to prove.

[2] Defendants do not ask for this relief in their Amended Complaint; however this was a claimed basis for their motion for conditional certification and was not addressed by this Court's Order as to whether these claims are being asserted. As such, Defendants maintain that these claims are not actually asserted but still point to the reasons that, if they are permitted to proceed, they would not be able to be proven by representative proof.

In Scott v. Raudin McCormick, Inc., 2010 U.S. Dist. LEXIS 130061 (D. Kan. 2010) the district court in Kansas examined a similar situation. There, the court acknowledged that in order to show whether each individual class member was or was not entitled to recovery an individual analysis of each days' work would be required, implicating that each claim would need to be individually proven based on the evidence submitted by "virtually hundreds of potential witnesses at trial." Id. at *10-15. Because of the fact intensive proof that the plaintiffs would necessarily have to submit, the defendants' defenses would also be highly individualized and the defendants anticipated calling hundreds of witnesses to testify in their defense due to each individual claim having separate and distinct facts from the others. Id. at *15. The court cited that "[t]he primary objectives of a § 216(b) collective action are: (1) to lower costs to the plaintiffs through the pooling of resources; and (2) to limit the controversy in one proceeding which efficiently resolves common issues of law and fact that arose from the same alleged activity." Id. at *16 (quoting Moss v. Crawford & Co., 201 F.R.D. 398, 410 (W.D. Pa. 2000)). This justified their finding that, due to the individualized facts involved in each claim, there would necessarily be two substantial trials in the action, the first to establish liability and the second to determine damages. Id. at *16. This was determined to not support the purposes of the

FLSA. Id. at *15-17 ("[T]he Court concludes that decertifying the condition class is required. As discussed, this case is fraught with questions requiring distinct proof as to individual plaintiffs, such as the hours, distance driven, and position worked in any given week during the relevant class period." Id. at *18). The case at bar is very similar to Scott and for the same reasons, decertification should be granted.

1. There are disparate factual and employment settings for each individual

As with all restaurants, each Plaintiff and Opt-in worked different shifts based on their situation and further worked with different management and coworkers. These factors alter the claims that each individual Plaintiff and Opt-in asserts and the factors which must be considered in whether to allow the claim to proceed as a class. In order to succeed in their claims, Plaintiffs and Opt-ins must prove that they worked in excess of forty hours per week and that they were not compensated at the appropriate overtime rate for those hours. 29 U.S.C. § 207(a)(1). Plaintiffs and Opt-ins' should never have been scheduled to work in excess of forty hours as Uncle Jack's policy was to not schedule employees for more than forty hours in a week. T.C., p. 85; P.L. Aff., ¶ 3; J.P. Aff., ¶ 3; J.K. Aff., ¶ 3; R.C. Aff., ¶ 3; A.S. Aff., ¶ 3; T.O. Aff., ¶ 3; J.G. Aff., ¶ 3; D.G. Aff., ¶ 4; M.T. Aff., ¶ 3; R.H. Aff., ¶ 3; R.B. Aff., ¶ 3; K.S. Aff., ¶ 3; G.V. Aff., ¶ 3. Further, the time records from which we have evidence of the hours worked demonstrate that Plaintiffs and Opt-ins often came in early, left late, did not clock out for their break and often forgot to clock out entirely. See *infra*, pp. 3-4. Where this occurs, Defendants are permitted to disregard these additional hours as they do not correspond with the schedule. 29 C.F.R. § 785.48. Plaintiffs and Opt-ins claims relate solely to a few instances where individual managers actively reduced the number of hours in excess of those which would otherwise be reduced for "rounding" purposes pursuant to Department of Labor regulations. Amended Complaint, ¶ 62.

Thus, individual circumstances such as what manager was responsible for the maintenance of timekeeping and what schedule the individual had will determine whether that individual has claims and to what extent they would be permitted to recover payment. Because these individual factors usurp class proof, Plaintiffs and Opt-ins are not similarly situated.

2. Individual defenses exist as to each Plaintiff and Opt-in's claims

Because each individual Plaintiff and Opt-ins' records demonstrate that they may have never worked an hour over forty, each individual Plaintiff and Opt-in will be subject to the defense that they were not entitled to compensation over forty hours, specifically utilizing the Department of Labor's regulations on rounding time that was improperly entered. 29 C.F.R. § 785.48.

Further, as and for the question of whether tips were improperly retained by Defendants, these claims are subject to individual defenses that many of the Plaintiffs and Opt-ins did not work all contract parties and may have never worked a contract party. Defendants utilized a tip pool which would have limited the affect of any alleged misappropriation of tips to that specific shift. Thus, Defendants will necessarily have to delve into the individual circumstances and defenses available to disprove the claims on a case by case basis.

3. Allowing the claims to proceed as a class is unfair to Defendants and is procedurally untenable

Procedurally, permitting Plaintiffs and Opt-ins to proceed with all of their claims will be unfair to Defendants and further be procedurally inefficient. The first of the two trials that would necessarily be conducted would necessarily, at minimum, determine whether each Plaintiff and Opt-in can establish that Defendants required them to work in excess of forty hours per week, whether they had knowledge of this, whether it was a willful violation, whether the individual Plaintiff or Opt-in worked contract parties, whether they were entitled to the entire tip from the contract party, and whether this violation was willful. The second would require each individual Plaintiff and Opt-in to proceed through their clock-in and clock-out cards to testify as to the reason that in each occasion their time differentiated from the schedule which they were supposed to be working on that day, how that effects the total number of hours for the week, whether there was a willful violation on the part of Defendants, who if anyone changed the total number of hours worked by that Plaintiff or Opt-in, how many contract parties that individual worked, when they were worked, how much in tips was collected and paid to that individual on that day and how much additional compensation were they entitled to collect and finally whether they are entitled to liquidated or compensatory damages for these claims. Each of these trials would require a jury to make factual determinations as to the individual claims of each Plaintiff and Opt-in for each week they claim compensation. As such, if Plaintiffs and Opt-ins are permitted to proceed collectively it would undercut the purpose of the FLSA's collective action proceeding.

CONCLUSION

Due to the highly individualized nature of Plaintiffs and Opt-ins' claims in this suit, Defendants request that this Court decertify the collective action and dismiss, without prejudice, all Opt-ins' claims.

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